

IN THE ANTI-DUMPING APPELLATE TRIBUNAL, PAKISTAN
(APPELLATE JURISDICTION)

Present:

Mr. Nasir Masroor Ahmed	Chairman
Mr. Ather Saleem	Member
Ms. Samaira Nazir Siddiqui	Member

C.M.A. No. 261 of 2022

In

Appeal No. 277 of 2018

1. **M/S DAWN CONVERTEC (SMC-PVT) LTD.**
Office Shed No. 1, Plot No. A/1, S.I.T.E, Karachi.
2. **M/S AMAFHH PAPER AND BOARD WORKS (PVT) LTD.** Office No. 4. Tawakal Mansion, Belasis Street, New Chali, Karachi.
3. **M/S AL-QAIM PAPER WORKS (PVT) LTD.**
Plot No. F-559, S.I.T.E, Karachi.
4. **M/S KHAIRULLAH PAPER AND BOARK WORKS 9PVT) LTD.** 1-6/11, Sector-5, Korangi Industrial Area, Karachi.
5. **M/S PAK PAP (PVT) LTD.**
Office No. 01, Ismail Centre, Tayyabjee Road, Off Sharah-e-Liaquat, Karachi.
6. **M/S AL-YAQEEN PACKAGES (PVT) LTD.**
Plot No. 150, Sector 23, Korangi Industrial Area, Karachi.
7. **M/S SAIMA PACKAGING (PVT) LTD.**
Plot No. 60/A. Sector 15, Korangi Industrial Area, Karachi.
8. **M/S HAMDARD PACKAGES (PVT) LTD.**
Plot No. 199, Sector No. 23, Korangi Industrial Area, Karachi.
9. **M/S AKMAL PRINT HOUSE (PVT) LTD.**
Plot No. A-70, Manghopir Road, S.I.T.E, Karachi.
10. **M/S ASA PRINTING PRESS 9SMC-PVT) LTD.**
Plot No. F-23, S.I.T.E Opposite Naya Dour Motor, Gul Bai, S.I.T.E, Karachi.
11. **M/S YAQEEN ART PRESS (PVT) LTD.**
Plot No. 202, Zainab Arcade, C.P. Berar Society, Block-3, B.M.C.H.S, Karachi.
12. **M/S STAR CONVERTORS (PVT) LTD.**
Plot No. A 165-167, Sector-6/G, Mahran Twon, Korangi Industrial Area, Karachi.
13. **M/S TASNEEM ENTERPRISES (PVT) LTD.**
Plot No. C-12, Sector 6-F, Mehran Town, Korangi Industrial Area, Karachi.
14. **M/S M. KAMIL & SONS (PVT) LTD.**
Office No. P-24/B, Behind Hashmi Can, Textile, Karachi.

15. **M/S SAAFA PAPER PRODCUTS (SMC-PVT) LTD.**
Plot No. 1730-2239 A, Haji Qasim Colony, Baldia Town,
Karachi.
16. **M/S DELUXE PACKAGES (PVT) LTD.**
Plot No. 14-A , Unit 149, sec 30, KIA , Karachi.
17. **M/S PRINTECH PACKAGES (PVT) LTD.**
F-656, Adjacent D-50, S.I.T.E, Karachi.

Appellants

VERSUS

1. **NATIONAL TARIFF COMMISSION,**
State Life Building # 05, Blue Area, Sector F-6/4 Islamabad.
2. **M/S CENTURY PAPER & BOARD MILLS LTD.**
Lakson Square Building No. 2, Sarwar Shaheed Road,
Karachi.

Respondents

For appellants : **Barrister Junaid Ahmed**, Advocate for
the appellant No. 4

For Respondent No. 1 : **Mr. Ahmed Sheraz**, Chief Legal Adv
Mr. Waqas Aamir & Mr. Azfar
Naeem, Legal Advisors

For Respondent No. 2 : **Mr. Saifullah Khan**, Advocate

Dates of Hearings : (1) March 18, 2022
(2) March 31, 2022
(3) April 7, 2022

Date of Order : **June 23, 2022**

ORDER

Nasir Masroor Ahmed: This civil miscellaneous application has been filed by the National Tariff Commission ("the Commission"), on 17.03.2022 on the ground that the impugned notice whereby the anti-dumping duty was levied had since expired and was no longer in the field pursuant to the initiation of sunset review proceedings undertaken by the Commission in terms of section 58 of the ADD Act. Now, the duty was not being collected under the impugned notice but in terms of notice of initiation of sunset review passed under section 58 of the ADD Act dated 25.02.2022. The appeals filed against impugned notice, which stands lapsed due to

efflux of time, have become infructuous. They contend that the review proceedings under section 58 of the ADD Act are fresh proceedings and not continuation of the initial proceedings as held in the WTO Panel Report in EU-Cost Adjustment Methodologies & US-Carbon Steel. They further submit that it is a settled principle of law that it favors the vigilant and not the indolent; since filing of appeal, the appellants had not argued their appeals neither they filed any early hearing application during pendency of the appeals, therefore, the appellant had no right of appeal as equity aids the vigilant, not those who slumber on their rights. Mr. Sheraz appeared before the Tribunal and added that the sunset review proceedings under section 58 *ibid* were fresh proceedings and were not the continuation of the initial proceedings, therefore, the impugned FD had become infructuous in light of the orders of Hon'ble Islamabad High Court in W.P. No. 569 of 2021 wherein it was held that 'review proceedings under section 58 of the Act are fresh proceedings and are not continuation of the original proceedings'. The said decision of the Hon'ble High Court was challenged before the Hon'ble Supreme Court in Civil Petition No. 1471 of 2021 which was disposed by the Hon'ble Court as having become infructuous. Thus, the point that the review proceedings were not a continuation of the original proceedings had attained finality and was binding precedent on the Tribunal under Article 201 of the Constitution of Pakistan, 1973. He concluded his arguments by saying that since the notification dated 10.4.2018 impugned in the Appeals had lapsed so the appeals became infructuous and no relief could be given to the Appellants, and the appeals were liable to be dismissed being infructuous.

2. Mr. Junaid Ahmed, learned counsel for the appellants in appeal No. 277 of 2018 appeared before the Tribunal and raised question of maintainability of the application made by the Commission and submitted that unless all the prayers of the appellants were not adjudicated upon, the appeal proceedings could not be declared infructuous. He disputed the Commission's stance that after the expiry of five years the FD had lapsed and argued that there was a need to make a distinction between the notice of imposition of anti-dumping duty and the FD report. The FD becomes the basis for review under section 58 of the ADD Act and based on the review proceedings, may result in continuation of the same duty or change of rate of duty or otherwise. Section 52 of the ADD Act provides for the refund of duty as a consequence of change in the rate of duty

pursuant to a successful appeal and that statutory right cannot be denied on the plea that notice of levy of anti-dumping duty or the determination itself had lived its prescribed life. The appeal itself is a statutory right under the ADD Act to protect the interest of the appellants and provides a remedy against any illegality, infirmity or injustice and ensuring that similar illegality would not recur in future and if the prayer clauses were accepted by this Tribunal then it would render sunset review infructuous. Mr. Junaid argued that if the duty imposed by the Commission was declared *void ab initio* or there was a change in duty rates then it would affect the result of sunset review under section 58 of the ADD Act. He also submitted that the sunset review is a next stage of continuation of the process initiated for determination of levying of anti-dumping duty to remove injury to the domestic industry. He contended that the judgment in W.P No. 569 of 2012 passed by the Hon'ble Islamabad High Court was distinguishable for the reason that in the said matter initially Anti-Dumping Duties were imposed for a period of 5 years which got expired and the domestic industry moved an application under section 58 of the Anti-Dumping Duties Ordinance, 2000 for continuation of the Duty. When the Commission undertook the sunset review, the petitioner challenged the same before the Hon'ble court on the plea that the Final Determination was void as the Commission was not properly constituted. The Hon'ble Court rejected the petitioner's arguments and held that sunset review was fresh proceeding for imposition of duty based on new evidence and would not be in continuation of earlier proceedings. He contended that whether on the expiry of notification of imposition of duty, due to efflux of time, the pending appeal before the competent forum would become infructuous, was not adjudicated by the Hon'ble Islamabad High Court hence the judgment relied upon by the Commission was distinguishable on the above facts.

3. He submitted that the question whether on expiry of notification of imposition of duty, the pending appeals would become infructuous was raised in Indian Supreme Court (Civil Appeal No. 949 of 2006) where a similar argument was taken by a domestic industry lawyer, which was rejected by the Court and the appeals were allowed. Similarly, Court of Justice of European Union (Case C-100/17 P) in the case of Gul Ahmed Textile Mills v Council held that expiry of the Final Determination does not make the appeals/proceedings devoid of purpose as expiry of anti-dumping duties results were not equivalent of annulment.

4. He further contended that the Commission was misreading the Panel reports i.e. Cost Adjustment Methodologies, EU-Footwear and US-Carbon Steel, as none of the reports said that on initiation of sunset review, earlier proceedings become infructuous. The Panel reports, in fact, suggested that original investigation and sunset review are distinct processes with different purposes.

5. He also denied that the delay was attributable to the appellants. There were number of factors which delayed the appeal proceedings i.e. Tribunal remained dysfunctional for more than two years, Corona-virus Pandemic and late submission of written reply of the Commission; therefore, the delay could not be attributed to the Appellants and concluding his arguments prayed that the Civil Miscellaneous Application filed by the Commission might be rejected.

6. We have heard arguments of both the sides and perused the record made available before us. The Anti-Dumping Duties Act, 2015 is a special law relating to imposition of anti-dumping duties to offset dumping and provides a framework for investigation and determination of dumping, injury and causal relationship between them. For the determination of dumping complete guidelines are provided in Part-III, IV and V of the ADD Act. Part-III of the ADD Act begins with section 4 which provides definition of dumping as introduction of goods into the commerce of Pakistan at a price less than its normal value. Sections 4 to 9 deal with the determination of the normal value. Section 10 deals with export price and Part-V with the comparison of normal value & export price and calculation of dumping margin. For the determination of injury to the domestic industry, Part-VI provides a complete scheme under section 15, 16 and 17. After determination of both dumping and injury the law requires determination of causal relationship between dumped imports and injury to the domestic industry. Section 18 also requires the Commission to examine whether any factors, other than dumping, are causing injury to the domestic industry.

7. The process of initiation of investigation starts with the filing of application by the domestic industry and culminates in the final determination. Part-VII & VIII provide procedure for initiation and conduct of investigation and Part-IX for Schedule of investigation, acquisition of information and assessment on the basis of data and preliminary and Final Determination of dumping and injury. In order to examine if there is an expiry date of final determination, or notice of the

FD or the imposition of anti-dumping duty, we examine the provision of section 39 of the ADD Act. Sub-section (1) and (2) prescribes the timeline and basis for making Final determination whereas sub-section (3) stipulates to issue a notice of final determination, while sub-section (4) outlines the information which the notice may contain, sub-section (5) describes the manner how notice of the final determination is to be issued. For the ease of reference relevant extracts of section 39 are reproduced as under:

39. Final determination.-(1) *The Commission shall normally make a final determination of dumping and injury within one hundred and eighty days of the date of publication of a notice of preliminary determination in the official Gazette under sub-section (3) of section 37.*

(2) *The final determination shall be based on information obtained by the Commission during the course of the investigation that has been disclosed by the interested parties;*

Provided that the Commission shall not be precluded from taking into consideration information or data received or collected from any other source.

(3) *The Commission shall, subject to the requirements for the protection of confidential information under section 31, issue a notice of the final determination, whether affirmative or negative, containing relevant information on the matters of fact and law and reasons that have led to the determination.*

(4) *Without prejudice to the generality of the provisions of sub-section (3) and in addition to such further information as may be prescribed, the notice of the final determination referred to in sub-section (3) shall specify:-*

- (a) *The amount of the dumping margin, if any, found to exist and the basis for such determination;*
- (b) *The amount of the definitive anti-dumping duties to be imposed, where applicable; and*
- (c) *If definitive anti-dumping duties are to be collected with regard to the imports to which provisional measures were applied along with the reasons for the decision to do so.*

(5) *The Commission shall publish a copy of the notice of the final determination referred to in sub-section (3) in the official Gazette and in at least one issue each of a daily newspaper in the English language and a daily newspaper in the Urdu language having wide circulation in Pakistan:*

Provided that such notice may, if the Commission deems it fit, only contain a summary of the salient features of the final determination:

Provided further that where the notice of the final determination contains only a summary of the salient features of the final determination, the Commission shall make available to any interested party applying for the same in writing a copy of the complete notice of final determination.

(6) The copy of the notice of the final determination shall be forwarded by the Commission to the exporting country and to other known interested parties.

Perusal of section 39 of the ADD Act, suggests that it does not prescribe the duration of final determination as well as its notice. In fact, Part-XV of the ADD Act deals with duration and review of anti-dumping duties. Section 57 of the ADD Act provides that anti-dumping duties imposed shall remain in force only as long as and to the extent necessary to counteract dumping, which is causing injury, section 57 is reproduced as under:

57. Duration of anti-dumping duty.-Subject to the provisions of this Act any anti-dumping duty imposed under this Act shall remain in force only as long as and to the extent necessary to counteract dumping, which is causing injury

Section 58 of the ADD Act deals with review of anti dumping duty and provides that any definitive anti dumping duty shall be terminated on a day not later than 5 years from the date of its imposition and section 58 of the ADD Act is reproduced as follows:

58. Review of anti-dumping duty—(1) Any definitive anti-dumping duty imposed under this Act shall be terminated on a date not later than five year from the date of its imposition or from the date of the most recent review under section 59, if such review has covered both dumping and injury.

(2).....

(3) A definitive anti-dumping duty shall not expire if the Commission determines, in a review initiated before the date of expiry on its own initiative or upon a duly substantiated request made by or on behalf of domestic industry within forty-five days from public notice of impending termination of the definitive antidumping duty concerned, that the expiry of such anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury and such anti-dumping duty shall remain in force pending the outcome of such a review.

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Anti-Dumping Duty Tribunal*

The above provisions show that timeline of five years has been prescribed in the context of imposition of duty. There is nothing in ADD Act that when sunset review proceedings are initiated, the FD report becomes redundant, only the duty imposed expires on completion of the period as specified in the notice of the FD. The duty, however, remains in force during the period of review and may also continue, if authority determines in the review that the expiry of such anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury. The words 'continuation' and 'recurrence' express a temporal relationship between past and future; something that is happening may continue in the future. This concept is elaborated in United States-Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Product from Japan (WT/DS244/AB/R) as under:

"104. Article 11.3 imposes a temporal limitation on the maintenance of anti-dumping duties. It lays down a mandatory rule with an exception. Specifically, Members are required to terminate an anti-dumping duty within five years of its imposition "unless" the following conditions are satisfied: first, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping; and third, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of injury. If any one of these conditions is not satisfied, the duty must be terminated."

It, therefore, follows that the expiry of the imposition of anti-dumping duty does not necessarily result in permanent termination of duty, in case of receipt of review application, the duty would continue during the period of review. Even, after the review, if the authority reached to the conclusion that expiry of the duty would lead to continuation or recurrence of injury, the duty would be re-imposed and shall remain in force as long as injury is being caused. From the above, it is evident that mere expiry of the notice of imposition of duty, on completion of five years term, does not have the effect of annulment of the duty.

8. The NTC's stance is that appeals pending before this Tribunal become infructuous when sunset review proceedings are initiated and relied on Hon'ble Islamabad High Court decision in W.P. No. 569 of 2012, the relevant paragraph is

reproduced as under:

"In the present case, 90-days prior to the expiry of aforementioned anti-dumping duty, the said notice had been published. Copy of the same is available on file. Sub-section (3) of section 58 ibid, provides that the period of anti-dumping duty shall not expire, if the Commission determines in a review initiated before the date of expiry on its own initiative or upon a duly substantiated request made by or on behalf of domestic industry within 45-days from public notice of impending termination. In other words, notice regarding expiry of the period prior to the date of expiry of a definitive anti-dumping duty and than within 45-days the domestic industry will have a right to file fresh application regarding imposition of anti dumping duty. In addition to that, the Commission itself would have the authority for fresh imposition of anti-dumping duty. In such a way, the whole proceedings for imposition of anti dumping duty are to be followed and in that case the importers as well as the complainant/domestic industry will have opportunity to plead their cases before the Commission. The fresh imposition of anti dumping duty, if any, would amount to review of the earlier determination, but would be based on new evidence and would not be in continuation of earlier duty, as the new determination would not be based on the evidence which was led in the earlier determination. As such, the ground taken by the learned counsel for the petitioner that since the earlier determination regarding imposition of anti dumping duty was made by improperly constituted Commission, so, the order passed by the Commission can not be reviewed, is not correct. The basis of the new order of imposition would not be the earlier order of Commission. SO, the argument of the learned counsel for the petitioner becomes meaningless. The argument that since the earlier order was without jurisdiction, then the subsequent order would be also without jurisdiction, would have no application in the present case.

The aforesaid judgment is distinguishable for the reasons that i) when the Commission undertook the sunset review, the petitioner challenged the same before the Hon'ble court on the plea that the Final Determination made by the Commission was void as it was not properly constituted ii) there was no appeal pending before the Tribunal when the said petition was filed before the Hon'ble court iii) there was no question before the Hon'ble court that whether the appeals pending adjudication become infructuous when sunset review is initiated. In the instant matter, the constitution of the Commission is not under question. Further,

the question being dealt by us was not adjudicated by the Hon'ble court, therefore, the said judgment is not relevant.

9. A similar argument was taken by domestic industry lawyer before Supreme Court of India in the Automotive Manufactures Association vs The Designated Authority & Ors (2011) in Civil Appeal No. 949 of 2006. In this appeal notified levy of anti-dumping duty was challenged mainly on the ground that the submissions by the appellant were not examined and they were not provided an opportunity of being heard by the Designated Authority ("the DA"). The Domestic Industry pleaded before the court that the appeals had become infructuous as the findings by the DA are no longer in the field since the sunset review has been conducted. The relevant extract is reproduced as under:

"42. Mr. Venugopal also pleaded that the present appeals had in fact been rendered infructuous as the original final findings by the DA are no longer in existence in view of the fact that sunset review has been conducted by the DA, pursuant to which the Central Government has revised the levy of duty vide its notification dated 31st March, 2009 which has not been out in issue by the Appellants..."

This plea of the domestic industry was rejected by the Supreme Court of India and the Appeals were allowed with the following orders.

64. In the result, the appeals are allowed to the extent mentioned above; the decision of the Tribunal is set aside and the Notification No. 36/2005-cus, dated 27th April 2005, is quashed. However, considering the facts and circumstances of the case, the parties are left to bear their own costs."

In addition, the Court of Justice of European Union in the case of Gul Ahmed Textile Mills v Council Case C-100/17P held that

"Regulation No. 397/2004 expired on 4 March 2009. That however does not make the present proceedings devoid of purpose, given that the expiry had an effect ex nunc and thus its results were not equivalent to those which an annulment would, in principle, have had.... an applicant's interest does not necessarily disappear where a disputed act no longer has any effect for the future. The expiry of the disputed act did not make it any less desirable to settle definitively the dispute as to the legality and scope of its provision with a view to determining its legal effects in the period up to the date of expiry. In the same vein, the interest may persist

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notwithstanding that the disputed act is obsolescent, has been repealed or replaced, is no longer applicable."

10. Appeal is a statutory right given under section 70 of the Anti-Dumping Duties Act, 2015 and the appellants preferred the appeals before this Tribunal being aggrieved, the same is pending adjudication. The Hon'ble Supreme Court of Pakistan in the matter of Mehram Ali & others vs. Federation of Pakistan & others (PLD 1998 SC 1445) held that access to justice is a fundamental right. In this situation, when an appellant approaches the right forum to remove their grievances within stipulated timeline, his right cannot be denied.

11. From the above discussion, it can be concluded that appeal is a statutory right of the appellants and expiry of imposition of duty, due to efflux of time, does not mitigate the grievances resulting in appeal thus the appeal would not become infructuous unless adjudicated upon. The Civil Miscellaneous Application, accordingly, stands dismissed. This order shall *mutatis mutandis* apply to CMA No. 240 of 2022 in Appeal No. 83 & 84 of 2016.

Announced in open court on this 23rd day of June, 2022.

Nsd
(Nasir Masroor Ahmed)
Chairman

Sd
(Ather Saleem)
Member

Sd
(Samaira Nazir Siddiqui)
Member

Dated: June 23, 2022

Approved for reporting



Case No:	368
Date of Presentation:	24-06-2022
No. of Words:	3300
No. of Pages:	11
Requisition Fee Rs.	(2 Rs)
Copy Fee:	(22 Rs)
Court Fee Stamp:	24-06-2022
Date of Completion:	24-06-2022
Date of Delivery:	Ahmed Ali
Compared by:	Jumaid Ahmed
Received by:	